This petition is timely filed from the issuance of the order of the circuit court below denying Petitioner's Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

Non-immediate relatives and family strangers are not protected persons under Section 237(a)(2) of the Immigration and Nationality Act, herein referred to as the Act, 8 U.S.C. §1227(a)(2) for which their being a victim in a battery by an alien will not subject the alien to removal from this country.

Counsel states to the Court that the Court of Appeals opinion must be reversed as non-immediate relatives and family strangers are not protected persons under Section 237(a)(2) of the Immigration and Nationality Act, herein referred to as the Act, 8 U.S.C. §1227(a)(2) and the determination by the Immigration Judge, Board of Immigration Appeals and the Circuit Court that the victims in the involved criminal convictions is erroneous as it improperly and without authority expands the scope of the federal law enacted by Congress and signed into law by the President. Counsel suggests that their actions amount to their legislating the law beyond the intent of Congress and the language used by Congress in the law.

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to combat domestic and international terrorism in the wake of the 1995 bombing of the federal office building in Oklahoma City, Oklahoma. The legislation made significant changes to the then existing immigration laws relating to exclusion,

criminal aliens and special removal proceedings for alien terrorists.

Later that year The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009, was enacted on September 20, 1996. This law made additional substantive changes to the immigration law. One of the additions to this law was the creation of a new very broad ground of removal based upon a conviction of a state or federal crime of domestic violence, stalking, child abuse, neglect or abandonment in INA §237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i).

The clear purpose of Congress in the enactment of INA §237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i) was to punish aliens for committing violent acts against women and children related or legally connected to the alien within the definition of the federal law and the law was so designed and drafted to act on this design. Attached to Petitioner's brief as Appendix is the complete submission statements of Senators Coverdell and Dole, who introduced the section of this law to the Senate.

These statements are relevant as they were made by the authors of the language of this section and are entitled to probative weight as to the meaning and extent of the law. The remarks of the members of congress in floor debate and reports can be used to determine congressional intent of a sentencing statute involved in its decision in the case of *United States v. Rush et al.*, 840 F.2d 574 (8th Cir. 1988) (en banc), cert. denied, 487 U.S. 1238, 108 S.Ct. 2908, 101 L.Ed.2d 940 (1988).

Senator Coverdell specifically stated that the purpose of this new section was to protect women and children

against violence. He described the then existing Immigration Act as providing for the deportation of aliens for the commission of criminal offenses under four broad headings as (1) general crime, (2) controlled substances, (3) certain firearm offenses, and (4) miscellaneous crimes. He stated that this bill was to create two new headings and they were (1) domestic violence, violation of a protection order, crimes against children and stalking, and (2) crimes of sexual violence. He stated his position that under the then existing law, while some of the offenses might be deportable under existing headings of crimes against moral turpitude or aggravated felony, they are not necessarily covered and varies from state to state and that misdemeanors were not covered.

He stated that under this amendment, stalkers would be deported on their first offense. He described the significance of this bill to be that over 200,000 women are stalked each year in this country, that 1.12 million children were victims of child abuse and negligence in 1994, which was a 27 percent increase from 1990 when the number of child victims of maltreatment to be some 800,000.

He concluded by stating that this amendment would protect women and children in our society and that the bill would have a very positive effect on the ability to deport aliens involved with these offenses.

Senator Dole stated to the Senate:

> "Mr. President, under Title 8 of the U.S. Code, a number of criminal offenses are deemed deportable offenses. However, although aliens are deportable for criminal offenses, there are a number of crimes that should be grounds for

> deportation that are left unaddressed, and the wording of the statute itself uses vague language like crimes of moral turpitude that lack the certainty we should desire.
>
> The amendment offered by Senator Coverdell and myself seeks to remedy this problem by making clear that our society will not tolerate crimes against women and children. The criminal law should be a reflection of the best of our values, and it is important that we not only send a message that we will protect our citizens against these assaults, but that we back it up as well."

He then continued on with statements regarding violation of protective orders and stalking, stating that over 200,000 women are stalked each year. He then continued on by stating as follows:

> "Mr. President, we face the same kinds of problems with existing law when we confront other crimes against women and children. While some of these offenses may be deportable under the existing headings of crimes of moral turpitude or aggravated felony, they are not necessarily and always covered. They should be.
>
> . . . It is not asking too much that we insist that we treat crimes against women and children as seriously as we do other offenses. Nor should we have to wait for that last violent act. When someone is an alien and has already shown a predisposition toward violence against women and children, we should get rid of them the first time. . . . "

This section of the bill detailed and specified those persons intended to be protected by and in this law. They are the "current or former spouse", or "the persons with

whom the victim shares a child in common," or "person cohabiting with or has cohabited with the victim as a spouse" or "by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction where the offenses occurs", or "any other adult person against a victim who is protected from that person's acts under the domestic or family violence laws of the United States or any state, Indian tribal government, or unit of local government."

Neither victim in the criminal cases for which Mr. Mossa was convicted come within the scope of a protected person of the federal law. Neither individual was nor were they alleged to be "current or former spouse", or "the persons with whom the victim shares a child in common", or "person cohabiting with or has cohabited with the victim as a spouse" or "by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction where the offenses occurs. The decision herein goes far beyond the intended scope of the federal law and the intent of Congress as it effectively determines that all violence against all persons at any residence address deportable upon the first violation simply because the prosecutor added the language "domestic violence" to the charge.

It cannot seriously be argued that the intent of Congress in its enactment of this law was to make protected persons within this statute all persons residing at a particular residence with an alien. A battery on persons other than spouses and children could be a removal offense only if the offense could be defined as an aggravated felony or a crime involving moral turpitude. Senators Coverdell and Dole's statements confirm this and clearly contradicts any suggestion that these victims could

be protected persons under their bill. The purpose of the law was to make violence against all women and children residing at a particular residence within certain family relationships of the perpetrator as protected persons within the law and it is clear that these victims do not fall within any protected area of this law.

The issue of this action is whether the plain language, statutory structure and legislative history support the conclusion that the last phrase in that section was intended to broaden the federal act's scope to family strangers or non-relatives beyond the specified relationships previously stated in that section, simply because they fell within the scope of the particular state or municipality there designated as a family violence law. The statements of Senators Coverdell and Dole reflect that it was not their intent to so broaden the section's coverage beyond family related women and children. Their introductory statements to the Senate show that the problem that this section was designed to affect was violence, sexual and otherwise, against spouses and children, and not to broaden the scope of the law to encompass batteries or violent offenses against family strangers whose only connection to the alien might be a common residence or address. Their statements were clear and certain to the effect that violence to familial non-relatives would continue to be covered by the broad sections of the then Section 241(a)(2), which described criminal offenses in the four general categories of general crime, controlled substances, certain firearm offenses, and miscellaneous crimes.

The starting point for any interpretation of a statute is the language of the statute itself and the determination of whether there is a clearly expressed legislative intent of the congress in the passage of the law.

The rule of *ejusdem generis* here applies. This rule provides that where general words follow an enumeration of specific items, the general words are read as applying only to the other items akin to those specifically enumerated. *Washington State Department of Social And Health Services et al. v. Guardianship Estate of Danny Keffeler*, 537 U.S. 371, 384, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003), *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001), *Norfolk & Western R, Co. v. Train Dispatchers*, 499 U.S.117, 129, 111 S.Ct. 1156, 113 L.Ed.2d 95 (1991), *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 84-85, 111 S.Ct. 415, 422, 112 L.Ed.2d 374 (1990), and *Gutierrez v. Aldo*, 528 U.S. 250, 255, 120 S.Ct. 740, 145 L.Ed.2d 747 (2000).

In the case of *PUD No. 1 of Jefferson County v. Washington Department of Ecology et al.*, 114 S.Ct. 1900, 1917, 511 U.S. 700, 728, 128 L.Ed.2d 716 (1994), the statutory reference to "appropriate" requirements was allowed to be construed only to provisions in state law similar to the other provisions of the environmental law imposing discharge-related restrictions. This Court therein concluded that the state could impose restrictions to only those conditions which are related to the discharges listed in the federal law. See also *Hughey v. United States*, 495 U.S. 411, 418-419, 110 S.Ct. 1979, 109 L.Ed.2d 498 (1990) wherein this Court found that a "catchall" phrase should not read to introduce into a restitution calculus losses which would expand the defendant's liability beyond the offense of the conviction.

This doctrine is one which holds that where general words in a statute follow the enumeration of particular classes of persons or things, the general words will be

construed as applicable only to persons and things of the same general value or class as there enumerated.

We here have a statute which enumerates and lists specific relationships to be protected by the law and concludes with more general words, which Petitioner suggests should be interpreted to ensure the protection of those previously specifically listed individuals and not to broaden the law to include individuals whose relationships with the alien was not intended to be protected by the law. Under this rule of construction, the last clause on the statute "by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs" must be read and defined by reference to the enumerated categories of family members which are recited just before it.

It is not proper to interpret this section to broaden its coverage beyond the intention of the legislature which enacted the law. Petitioner's arguments are further buttressed by the government's failure to submit any supplemental record from the Congress or from any of its proceedings which might be interpreted to support its position before this Court that Congress intended that "protected persons" within this federal law to cover all persons residing at the same address as the alien irregardless of the lack of family relationship or connection.

The circuit court's failure to show any consideration of congressional intent in the scope of this law as part of its adjudication process is clear error and cause for reversal.

It is clear that in removal proceedings, the Department of Homeland Security (DHS) has the burden of proving that the victim of the "crime of domestic violence" is a protected person within the meaning of section

237(a)(2)(E)(i) of the Act. Neither the charge nor the facts or record in this case involve any allegation or finding by the DHS, Immigration Judge, Board of Immigration Appeals or the circuit court that the victim therein had any family or other relationship to Petitioner within the meaning, purpose and intent of the federal law. The decisions in this case are therefore founded upon the evidentiary failure of proof of that fact.

Counsel suggests that the Board and the circuit court, in their simple and non-specific decisions, simply and erroneously concluded and acted as the common residence in and of itself was sufficient to bring that case within the last catch-all phrase of this federal law, notwithstanding the fact neither the charge nor findings of the fact-finder stated a factual basis of how the victims were protected persons within the purview of the federal law. The record in this case is void of any allegation or evidence that either and/or both the victims in the convictions herein involved "cohabited" with the victim either as a spouse, former or current, as an individual with whom he shared a child in common or that they were protected individuals within the meaning of section 237(a)(2)(E)(i) of the Act.

CONCLUSION

Had Congress intended that all aliens be subject to removal from this country as a result of all batteries and acts of violence committed in a residence where the alien resides, it would have so simply designed the bill to so reflect that purpose and Petitioner herein would have had no complaint. Had Congress intended to extend the law

defining aggravated felonies for which all aliens would be subject to removal from this country without exception all crimes of violence where the term of imprisonment is at least one year or more or where crimes of violence resulting in any conviction and any sentence occurred in a residence, it would have so simply designed the bill to so reflect that purpose and Petitioner herein would have had no complaint.

In this case, Petitioner is being removed from this country for a minor and nominal conviction for which there was no record or report of injury by a victim and where there was no immediate relative relationship between himself and the victims. He was placed in removal proceedings solely because of the discretionary action of the state prosecutor, for his procedural convenience, adding the verbiage "domestic violence" to the criminal charge against Petitioner. Without that verbiage in the criminal charge, Petitioner, though convicted, would not be removable from this country for being convicted of any criminal offense.

Counsel suggests that the Court should reverse the circuit court's decision as being clearly being beyond the intent of Congress in the enactment of INA §237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i) and not being supported by the evidence in the record. Mr. Mossa should not suffer the ultimate, extreme, permanent and irreversible penalty of

removal from this country upon the flimsy factual and legal reasons here existing.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-1751

Mesba Keder Mossa, Petitioner, v. Alberto Gonzales, Attorney General of the United States, Respondent.	* * * * * * * * * * *	Petition for Review from a Decision of the Board of Immigration Appeals. [UNPUBLISHED]

Submitted: December 16, 2005
Filed: December 28, 2005

Before MELLOY, COLLOTON, and BENTON, Circuit Judges.

PER CURIAM.

Mesba Keder Mossa petitions for review of a final order of the Board of Immigration Appeals. *See* 8 U.S.C. § 1252. An Immigration Judge ordered Mossa removed for two prior domestic-battery convictions under Kansas law, pursuant to 8 U.S.C. § 1227(a)(2)(E)(i). The BIA affirmed the IJ. Mossa claims that his convictions are not "crimes of domestic violence" against a "protected person" under 8 U.S.C. § 1227(a)(2)(E)(i). These arguments are without merit. An alien is deportable if convicted of a crime of domestic violence against any person who is protected

under the domestic violence laws of any state. *See* 8 U.S.C. § 1227(a)(2)(E)(i). Kansas law protects "household members" who reside together from "domestic battery" by other residents of the same household. Kan. Stat. Ann. §§ 21-3412(c)(4) (2000); 21-3412a(c)(1) (2001). As Mossa committed domestic battery against two "household members" – his brother and his cousin – both of his convictions fall squarely within the Act. Accordingly, after a de novo review of the legal determinations, no error of law appears. This court denies Mossa's petition for review. *See* 8th Cir. R. 47B.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
CHICAGO, ILLINOIS
Sitting in Kansas City, Missouri

File: A47-060-734	)	December 12, 2003
In the Matter of	)	IN REMOVAL
Mesba Keder MOSSA,	)	PROCEEDINGS
Respondent.	)	

CHARGE: Section 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(i) – alien who at any time after entry has been convicted of a crime of domestic violence.

APPLICATIONS: Motion to Terminate.

Voluntary Departure.

ON BEHALF OF THE RESPONDENT:
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Kansas City, Missouri 64111

ON BEHALF OF THE GOVERNMENT:
Paula V. Davis,
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Department of Homeland Security
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DECISION OF THE IMMIGRATION JUDGE

I. BACKGROUND

The respondent is a 29-year-old male who is a native and citizen of Ethiopia. He was admitted to the United States on October 2, 1999 as a Lawful Permanent Resident. On June 11, 2001, the respondent was convicted in the District Court of Johnson County, Kansas, for the

offense of domestic battery, in violation of K.S.A. 21-3412 (2000) and sentenced under K.S.A. 21 4502(1)(b).[1] Approximately three months later, on September 28, 2001, the respondent was again convicted in the District Court of Johnson County, Kansas, for the offense of domestic battery, in violation of 2001 Kan. Sess. Laws Ch. 177, § 5 and sentenced under K.S.A. 21-4502(1)(a).[2]

Subsequently, the Department of Homeland Security ("DHS") commenced removal proceedings against the respondent by filing a Notice to Appear ("NTA"), dated January 18, 2002, charging that the respondent is removable pursuant to section 237(a)(2)(E)(i) of the Immigration and Nationality Act ("INA"), for having been convicted of a crime of domestic violence. *See* Gr. Ex. 1.

At the master hearing held on January 7, 2003, the respondent admitted factual allegations 1-4[3] contained in the NTA, however, he disputes allegations 5 and 6, specifically that he was convicted of a crime of domestic violence.[4] *See* Gr. Ex. 1. The respondent also disputes that he

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[1] Misdemeanor Class B, the sentence of confinement shall not exceed six months

[2] Misdemeanor Class A, the sentence of confinement shall not exceed one year

[3] (1) That he is not a citizen or national of the United States: (2) That he is a native and a citizen of Ethiopia; (3) That he entered the United States on or about October 2, 1999, and (4) That he was admitted as a Legal Permanent Resident. *See* Gr. Ex. 1.

[4] (5) That on June 11, 2001, the respondent was convicted in the District Court of Johnson County, Kansas, for the offense of Domestic Battery, in violation of K.S.A. 21-3412; and (6) That on September 28, 2001, the respondent was convicted in the District Court of Johnson County, Kansas, for the offense of Domestic Battery, in violation of K.S.A. 21-4502(1)(a).

is removable as charged and he has filed a Motion to Terminate the removal proceedings. In the alternative, the respondent is requesting voluntary departure.

II. MOTION TO TERMINATE

A. The Evidence Presented

The Respondent submitted the following documents in support of his Motion to Terminate: *Gr. Ex. 6*: Motion to Terminate Proceedings including K.S.A. 21-3412 (2001); *Gr. Ex. 9*: Reply Suggestions in Support of Motion to Terminate Proceedings; *Ex. 11*: Supplemental Suggestions in Support of Motion to Terminate Proceedings; *Ex. 12*: Amended Supplemental Suggestions in Support of Motion to Terminate Proceedings; and *Ex. 13*: Affidavit of Abdu Sernan Mossa (cousin of the Respondent and named victim in the September 28, 2001 battery). The DHS attorney submitted the following documents in opposition to the Respondent's Motion to Terminate; *Gr. Ex. 1*: Notice to Appear; *Gr. Ex. 8*: Service Opposition to Respondent's Motion to Terminate; and *Gr. Ex. 14*: tab A: Face Sheet of Immigrant Visa, tabs B & C: the Respondent's Conviction Records, tab D: S. 250, 2001 Kan. Sess. Laws Ch. 177, § 5, tab E: K.S.A. 21-3142(a) (2001 Supp.).

In the Respondent's Motion to Terminate, he contends that he is not removable as charged because his two convictions do not meet the definition of "crime of domestic battery" contained in INA § 237(a)(2)(E)(i). Specifically, he argues that neither conviction is a crime of violence as

required by INA § 237(a)(2)(E)(i) and neither conviction involved protected persons under INA § 237(a)(2)(E)(i).[5]

The Department of Homeland Security contends that both of the Respondent's convictions are crimes of domestic violence under INA § 237(a)(2)(E)(i). Specifically, the DHS attorney contends that both offenses constitute crimes of violence and that both offenses were committed against protected persons under INA § 237(a)(2)(E)(i).

B. ANALYSIS

The DHS has initiated removal proceedings against the respondent alleging that he committed a crime of domestic violence as defined in INA § 237(a)(2)(E)(i). Section 237(a)(2)(E)(i) of the INA defines a crime of domestic violence as follows:

> any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts

[5] The Respondent also made the following additional arguments; (1) the Respondent's June 11, 2001 conviction was for battery and not domestic battery; (2) neither of the Respondent's sentences equaled or exceeded one year therefore he is not removable for having been convicted of a crime of violence; and (3) the Respondent is not removable for having been convicted of an aggravated felony or other removable offense.

> under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

Because INA § 237(a)(2)(E)(i) makes "any crime of violence" against a protected person a crime of domestic violence, the crime need not be defined as a crime of domestic violence under state law in order to fall within the federal definition. Thus, determining whether a crime is a crime of domestic violence requires a two-prong analysis: (1) whether the crime is a "crime of violence" as defined by 18 U.S.C. § 16 and (2) whether the victim is a protected person under INA § 237(a)(2)(E)(i).

1. Crime of Violence

The first issue is whether either of the respondent's convictions is a "crime of violence" as defined by 18 U.S.C. § 16. According to 18 U.S.C. § 16, crime of violence means:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other force that is a *felony* and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense

(emphasis added).

Neither of the Respondent's two convictions constitute a crime of violence under 18 U.S.C. § 16(b) because neither offense is a felony under state or federal law. The Respondent's June 11, 2001 and September 28, 2001 convictions

for domestic battery are classified as misdemeanor offenses in Kansas.[6] In addition, the offenses are misdemeanor offenses for purposes of federal law because neither offense was punishable by a term of imprisonment of more than one year. *See* 18 U.S.C. § 3559(a)(5) (2003) (classifying "felonies as offenses punishable by a term of imprisonment of more than 1 year); *see also In re Martin*, 23 (I&N) Dec. 491, 493 (BIA 2002). Specifically, the Respondent's June 11, 2001 conviction was punishable by a maximum term of imprisonment of six months and his September 28, 2001 conviction, by a maximum term of imprisonment of 1 year.[7]

Although the Respondent's convictions do not fall within 18 U.S.C. § 16(b), the Court finds that both convictions are crimes of violence under 18 U.S.C. § 16(a). According to 18 U.S.C. § 16(a), "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" is a crime of violence. The Respondent contends that neither of his convictions have as an element "the use, attempted use, or threatened use of physical force" because both of his convictions were under Kansas laws that allow for convictions involving reckless actions. The DHS attorney contends that although the Kansas statute allows for

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[6] *See* Gr. Ex. 14, tab B & C. On June 11, 2001, the Respondent was convicted of domestic battery, a *Class B Misdemeanor*, under K.S.A. 21-3412 (2000) and K.S.A. 21-4502(1)(b). On September 28, 2001, the Respondent was convicted of domestic battery, a *Class A Misdemeanor*, under 2001 Kan. Sess. Laws Ch. 177 § 5 and K.S.A. 21-4502(1)(a).

[7] According to K.S.A. 21-4502(1)(b), the sentence of confinement for a Class B Misdemeanor shall not exceed six months and according to K.S.A. 21-4502(1)(a), the sentence of confinement for a Class A Misdemeanor shall not exceed one year.

intentional or reckless conduct, "the use, attempted use, or threatened use of physical force" is a statutory requirement. The Court will evaluate each conviction below.

a. Respondent's June 11, 2001 Conviction

On June 11, 2001, the Respondent was convicted of "Domestic Battery" in violation of K.S.A. 21-3412. *See* Gr. Ex. 14, tab B. As a threshold matter, the Respondent's counsel contends that K.S.A. 21-3412 is not a domestic battery statute and argues that the word "domestic" was added gratuitously by the prosecutor. *See* Ex. 6. However, as stated previously, because INA § 237(a)(2)(E)(i) makes "any crime of violence" against a protected person a crime of domestic violence, the crime need not be defined as a crime of domestic violence under the state law in order to fall within the federal definition. Although the classification of the offense under state law is irrelevant to this Court's analysis regarding whether it is a crime of violence, the Respondent's contention that he was convicted of battery and not domestic battery is simply incorrect. The Respondent's counsel submitted a copy of K.S.A. 21-3412[5] in support of his contention, however, the version submitted contains amendments as late as July 1, 2001, which is after the date of the Respondent's conviction. Put another way, the Respondent's counsel did not submit the version of the statute under which the Respondent was actually convicted. Upon further research, the Court found

[5] K.S.A. 21-3412, as amended on July 1, 2001, states: "(a) Battery is: (1) Intentionally or recklessly causing bodily harm to another person; or (2) intentionally causing physical contact with another person when done in a rude, insulting or angry manner. (b) Battery is a class B misdemeanor."

that K.S.A. 21-3412, as it existed on June 11, 2001, was both a battery and domestic battery statute. *See* K.S.A. 21-3412 (2000). It read as follows:

> (a) Battery is:
>
> (1) Intentionally or recklessly causing bodily harm to another person; or
>
> (2) intentionally causing physical contact with another person when done in a rude, insulting or angry manner.
>
> (b) Except as provided in subsection (c), battery is a class B misdemeanor.
>
> (c)(1) Upon a first conviction of a violation of this section under circumstances which constitute a domestic battery, a person shall be guilty of a class B person misdemeanor and sentence to not less than 48 consecutive hours nor more than six months' imprisonment and fined not less than $2000, nor more than $500 or in the court's discretion the court may enter an order which requires the person enroll in and successfully complete a domestic violence prevention program(dots4)

K.S.A. 21-3412 (2000). The statute was later amended on July 1, 2001, and section (c) was severed from K.S.A. 21-3412 and added to a new domestic battery statue. *See* 2001 Kan. Sess. Laws Ch. 177, § 6; K.S.A. 21-3412a (2001). Consequently, the respondent's June 11, 2001 conviction is for domestic battery.

Now that the Court has determined the statute under which the Respondent was convicted, the critical issue remains whether the Respondent was convicted of a crime

of violence. The Kansas Statute penalizes "(1) Intentionally or recklessly causing bodily harm to another person; or (2) intentionally causing physical contact with another person when done in a rude, insulting or angry manner." K.S.A. 21-3412 (2000). The conviction record does not indicate under what subsection the Respondent was convicted. *See* Gr. Ex. 14, tab B. The Board of Immigration Appeals ("BIA") held in *Matter of Sweetser*, that when faced with a divisible statute, the court may look to the record of conviction and other documents admissible in evidence in order to determine under which portion of the statute the respondent was convicted. *See Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999) (finding that the respondent was convicted under a divisible statute because the statute "encompasses offenses that include as an element the use, attempted use or threatened use of physical force . . . as well as offenses that include as an element the use, attempted use or threatened use of physical force . . . as well as offenses that do not"). However, the statute present in this case is not a divisible statute. The statute only encompasses offenses that contain as an element "the use, attempted use or threatened use of physical force." Put another way, both sections of the Kansas statute contain an element of physical force. Section (1) of K.S.A. 21-3412 (2000), penalizes intentionally or recklessly *causing bodily harm* and section (2) of K.S.A. 21-3412 (2000), penalizes intentionally causing *physical contact* when done in a rude, insulting or angry manner. (emphasis added).

In *United States v. Smith*, 171 F.3d 617 (8th Cir. 1999), the Eighth Circuit held that an assault conviction for "committing an act intended to cause pain, injury, or offensive or insulting physical contact" contained as an

element "the use or threatened use of physical force." In a footnote, the Eighth Circuit stated that "such physical contact, by necessity, requires physical force to complete." *See id* at 621 n.2.[9] Similarly, in this case, the Kansas statute penalizes both intentionally and recklessly causing bodily harm and intentionally causing physical contact. Such physical contact and such bodily harm, by necessity, require physical force to complete. As such, "the use, attempted use or threatened use of physical force" is an element of K.S.A. 21-3412 (2000).

In his Motion to Terminate, the Respondent appears to contend that in order to constitute a crime of violence under 18 U.S.C. 16(a), the offense must be conducted with intent to use physical force and not by mere recklessness.[10] However, there is no indication from the language of 18 U.S.C. 16(a) or from the Eighth Circuit that intent is a necessary element. In *United States v. Gonzalez-Lopez*, 335 F.3d 793, 799 (8th Cir. 2003), the Eighth Circuit held that the definition of crime of violence contained in USSG § 2L1.2(b)(1) – which is identical to the language contained in 18 U.S.C. § 16(a) except that the guideline applies only to physical force used against the person, but not the property of another – does not contain a volitional element. Similarly, I find that 18 U.S.C. 16(a) does not

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[9] *Cf. Flores v. Ashcroft*, 2003 WL 22805692 (7th Cir.) (holding that a misdemeanor battery conviction under Indiana law is not a crime of violence under 18 U.S.C. § 16(a) because the Indiana statute only contains as an element the intent to touch but not the intent to injure and therefore the Indiana statute does not contain as an element the use, attempted use or threatened use of physical force).

[10] Ironically, upon reviewing the complaints for the Respondent's two convictions, he was charged with intentional and not reckless battery on both occasions. *See* Gr. Ex. 14, tabs B & C.

contain a volitional element and reckless acts may constitute crimes of violence under this section.

Therefore after carefully evaluating the Respondent's arguments, I find that his June 11, 2001 conviction involved an offense containing as an element "the use, attempted use or threatened use of physical force," therefore he was convicted of a crime of violence as defined in 18 U.S.C. § 16(a).

b. Respondent's September 28, 2001 Conviction

Similarly the court holds that the Respondent's September 28, 2001 conviction is a crime of violence as defined in 18 U.S.C. § 16(a). The Respondent was convicted under 2001 Kan. Sess. Laws Ch. 177, § 5.[11] *See* G.R. Ex. 14, tabs C & D. According to the statute, "(a) domestic battery is: (1) intentionally or recklessly causing bodily harm by a family or household member against a family or household member; or (2) intentionally causing physical contact with a family or household member by a family or household member when done in a rude, insulting or angry manner." 2001 Kan. Sess. Laws Ch. 177, § 5. Similar to the Respondent's previous conviction, the conviction record in this case does not indicate under which section he was convicted. However, for the same reasons as stated above, this statute is not divisible because both sections of the statute include as an element "the use, attempted use or threatened use of physical force." Because both sections contain physical force as an element, the Court finds that the Respondent's conviction under 2001 Kan. Sess. Laws

[11] Currently codified at K.S.A. 21-3412a (2001).

Ch. 177, § 5 constitutes a crime of violence under 18 U.S.C. § 16(a).

The court has found that both convictions were for crimes of violence, however in order to constitute a crime of domestic violence, the victim of the crime must be a protected person under INA § 237(a)(2)(E)(i).

2. Protected Persons

The Respondent argues that the victim of his June 11, 2001 offense was Nesru Seman, his brother, and the victim of his September 28, 2001 offense was Abdu Seman Mossa, his cousin. he concedes that he was living with these individuals, but he contends that neither victim is a protected persons under INA § 237(a)(2)(E)(i). *See* Gr. Ex. 6. Specifically, he insists that the victims are "familial strangers" and that Congress did not intend "to protect familial strangers beyond the spouse, legal, common-law or the specifically designated immediate relatives in the law." *See* Ex. 11. He further contends that if certain states protect familial strangers and others do not, this leads to an "inconsistent result" "not appropriate or called for until [*sic*] the facts of this case." *see id.*

The DHS attorney contends that INA § 237(a)(2)(E)(i) clearly defines protected persons as including any person protected under the domestic or family violence laws of any state. The DHS attorney further contends that the Kansas statute protects any person sharing a residence, regardless of their relationship. The Court finds that the DHS attorney's arguments persuasive and will find that both of the Respondent's convictions involved protected persons under the Kansas domestic violence statute in effect at the time of conviction.

According to INA § 237(a)(2)(E)(i), a crime of domestic violence is a crime of violence "against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or *by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State*, Indian tribal government, or unit of local government." (emphasis added). As such, the section protects any person who is protected under the domestic or family violence laws of any State. In this case, the victims of both of the Respondent's offenses were protected persons under the Kansas domestic violence laws.[12]

a. Respondent's June 11, 2001 Conviction

The Respondent's first conviction on June 11, 2001 involved a domestic battery against Nesru Seman, his brother. He was convicted of Domestic Battery under K.S.A. 21-3412 (2000). According to K.S.A. 21-3412(c)(4)(A) (2000), "Domestic battery means a battery against a family or household member by a family or household member." "[F]amily or household member means persons 18 years of age or older who are spouses, former spouses, parents or

[12] The Court does not have jurisdiction to entertain the Respondent's constitutional challenge to INA § 237(a)(2)(E)(i), specifically that depending on the level of protection in a particular state, a person convicted of battering one's brother or cousin may be convicted of a crime of domestic violence in one state but not the other.

stepparents and children or stepchildren, *and persons who are presently residing together or who have resided together in the past*, and persons who have a child in common regardless of whether they have been married or have lived together at any time." K.S.A. 21-3412(c)(4)(B) (2000) (emphasis added). Therefore, the Kansas statute protects persons who are presently residing together regardless of the familial relation. *See id.* Here, the Respondent lived with his brother. As such, his brother is a protected person under the Kansas statute and therefore also a protected person under INA § 237(a)(2)(E)(i). Inasmuch as the Respondent's June 11, 2001 conviction is a crime of violence committed against a protected person, he has been convicted of a crime of domestic violence under INA § 237(a)(2)(E)(i).

b. Respondent's September 28, 2001 Conviction

The Respondent's second conviction on September 28, 2001 involved a domestic battery against Abdu Sernam Mossa, his cousin. According to 2001 Kan. Sess. Laws Ch. 177, § 5(c)(1) "Family or household member means persons 18 years of age or older who are spouses, former spouses, parents or stepparents and children or stepchildren, *and persons who are presently residing together or who have resided together in the past*, and persons who have a child in common regardless of whether they have been married or have lived together at any time. . . . " (emphasis added). Here, the Respondent lived with his cousin and therefore his cousin is a protected person under the Kansas statute. *See* 2001 Kan. Sess. Laws Ch. 177, § 5(c)(1). Inasmuch as the Respondent's September 28, 2001 conviction is a crime of violence committed against a protected person, he has

been convicted of a crime of domestic violence under INA § 237(a)(2)(E)(i).

Because the DHS has established that the Respondent has been convicted of two crimes of domestic violence, the Court will deny the Respondent's Motion to Terminate.[13] In addition, the Court finds that the DHS has established by clear and convincing evidence that the Respondent is removable as charged. *See* INA § 240(c)(3)(A) (2003); 8 C.F.R. 1240.8(a) (2003); *Cf. Woodby v. INS*, 385 U.S. 276, 286 (1966). The respondent declined to designate a country of removal, therefore the Court designates Ethiopia. *See* INA § 241(b) (2003). The Respondent has alternatively requested voluntary departure. For the reasons mentioned below, his request will be denied.

VOLUNTARY DEPARTURE

The Respondent has requested the privilege of voluntarily departing the United States. There are two forms of voluntary departure. One is requested prior to the completion of proceedings and the other at the conclusion of proceedings. INA §§ 240B(a), 240B(b). The Respondent requested voluntary departure at a master calendar hearing prior to the conclusion of proceedings, therefore his request will be analyzed under INA

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[13] The Respondent also argued in his Motion to Terminate that he is not removable for having been convicted of an aggravated felony, specifically a crime of violence for which the term of imprisonment is at least one year. *See* INA § 237(a)(2)(A)(iii); INA § 101(a)(43)(F). The Court will not address this argument because the DHS has not charged the Respondent with removal as an aggravated felon.

§ 240B(a).[14] Pursuant to INA § 240B(a), an alien may be granted voluntary departure prior to the completion of proceedings if the alien is not deportable under section 237(a)(2)(A)(iii) (convicted of an aggravated felony) or section 237(a)(4)(B) (engaged in terrorist activities). The Regulations state than an alien may be granted voluntary departure under INA § 240B(a) only if the alien concedes removability and waives appeal of all issues. 8 C.F.R. § 1240.26(b)(C), (D) (2003). In this case, the Respondent has not conceded removability and he has not waived appeal of all issues, therefore he is not eligible for voluntary departure under INA § 240B(a).

Accordingly the following order shall be entered.

ORDER OF THE IMMIGRATION JUDGE

IT IS HEREBY ORDERED that the Respondent's Motion to Terminate be DENIED.

IT IS FURTHER ORDERED the Respondent's request for Voluntary Departure be DENIED.

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[14] Although the Court finds that the Respondent requested voluntary departure under 240B(a) prior to the completion of proceedings, even if he had requested voluntary departure at the conclusion of proceedings under 240B(b), he would not be eligible. Section 240B(b) requires that an alien establish that he or she has been a person of good moral character during the five year period immediately preceding the application for relief. According to INA § 101(f)(7), an individual who has been confined for an aggregate period of 180 days cannot establish good moral character. In this case, the Respondent was confined for an aggregate period of more than 180 days (see Gr. Ex. 14, tabs B & C), therefore he would be ineligible for voluntary departure under 240B(b).

IT IS FURTHER ORDERED, that the Respondent be removed to Ethiopia on the charge contained in the Notice to Appear.

/s/ O. John Brahos
O. JOHN BRAHOS
IMMIGRATION JUDGE

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A47 060 734 – Kansas City, Missouri

Date: FEB 28, 2005

In re: MESBA KEDER MOSSA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert Frager, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. § 1227(a)(2)(E)(i)] – Convicted of crime of domestic violence, stalking, or child abuse, neglect, or abandonment

APPLICATION: Termination of proceedings

ORDER:

PER CURIAM. The respondent appeals from the decision of an Immigration Judge dated December 12, 2003, ordering the respondent removed from the United States to Ethiopia. As we do not find the Immigration Judge's determination that the respondent is removable as charged to be clearly erroneous, we adopt and affirm that decision. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adopting or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"); 8 C.F.R.

§ 1003.1(d)(3) (stating that the Board may not engage in *de novo* review of findings of fact, and instead shall review such findings solely to determine whether they are clearly erroneous).

/s/ [Illegible]
FOR THE BOARD

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-1751

Mesba Keder Mossa, Petitioner, vs. Alberto Gonzales, Attorney General of the United States, Respondent.	*	Petition for Review

The petition for rehearing by the panel filed by Petitioner has been considered by the court and is denied.

(5193-010199)

February 16, 2006

Order Entered at the Discretion of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

*142 Cong Rec S 4058,**

CONGRESSIONAL RECORD – *Senate*

Wednesday, **April 24, 1996**

104th Congress 2nd Session

142 Cong Rec S 4058

REFERENCE: Vol. 142 No. 54

TITLE: IMMIGRATION CONTROL AND FINANCIAL RESPONSIBILITY ACT OF 1996

TEXT:

The Senate continued with consideration of the bill.

AMENDMENT NO. 3737 TO AMENDMENT NO. 3725

(Purpose: To establish grounds for deportation for offenses of **domestic violence**, stalking, crimes against children, and crimes of sexual violence without regard to the length of sentence imposed)

Mr. COVERDELL. Mr. President, I send a second-degree amendment to the pending amendment to the desk on behalf of the majority leader and myself.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Georgia (Mr. Coverdell) for himself and Mr. Dole proposes an amendment numbered 3737 to amendment 3725.

Mr. COVERDELL. Mr. President, I ask unanimous-consent reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

At the end of the amendment, insert the following:

SEC. . EXCLUSION GROUNDS FOR OFFENSES OF **DOMESTIC VIOLENCE**, STALKING, CRIMES AGAINST CHILDREN, AND CRIMES OF SEXUAL VIOLENCE.

(a) In General – Section 241(a)(2) (8 U.S.C. 1251(a)(2)) is amended by adding at the end the following:

"(E) **Domestic violence**, violation of protection order, crimes against children and stalking. – (i) Any alien who at any time after entry is convicted of a crime of **domestic violence** is deportable.

"(ii) Any alien who at any time after entry engages in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable.

"(iii) Any alien who at any time after entry is convicted of a crime of stalking is deportable.

"(iv) Any alien who at any time after entry is convicted of a crime of child abuse, child sexual abuse, child neglect, or child abandonment is deportable.

"(F) Crimes of sexual violence. – Any alien who at any time after entry is convicted of a crime of rape, aggravated sodomy, aggravated sexual abuse, sexual abuse, abusive sexual contact, or other crime of sexual violence is deportable."

(b) Definitions. – Section 101(a) (8 U.S.C. 1101(a)) is amended by adding at the end of the following new paragraphs:

"(47) The term 'crime of domestic' means any felony or misdemeanor crime of violence committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other adult person against a victim who is protected from that person's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

"(48) The term 'protection order' means any injunction issued for the purpose of preventing violent or threatening acts of **domestic violence**, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.".

(c) This section will become effective one day after the date of enactment of the Act.

Mr. COVERDELL. Mr. President, aliens are deportable for criminal offenses under section 241(a)(2) under four broad headings: General crime, controlled substances, certain firearm offenses, and miscellaneous crimes. This proposed amendment to S. 1664 creates two new headings: **Domestic Violence**, violation of a protection order, crimes against children, and stalking. The other heading, crimes of sexual violence.

We are adding as offenses for grounds for deportation, the following offenses: Conviction of a crime of **domestic violence**; violation of a judicial protection order in a **domestic violence** context; conviction for stalking; conviction for child abuse, child sexual abuse, child negligence, or child abandonment; conviction of rape, aggravated sodomy, aggravated sexual abuse, sexual abuse, abusive sexual contact, or other crimes of sexual violence.

Mr. President, while some of these offenses may be deportable under existing headings of crimes of moral turpitude or aggravated felony, they are not necessarily covered. Uniformity is also a problem. Whether a crime is one of moral turpitude is a question of State law and thus varies from State to State. An offense may be deportable in one State and not deportable in another. Misdemeanor offenses would not be covered under existing law.

Mr. President, under our amendment, stalkers would be deportable on their first offense. The second offense may be too late for their victims, who could well be injured or dead as a result.

Mr. President, it is estimated that over 200,000 women are stalked each year in the United States. Approximately 5 percent of all women will be stalked at some time in their lives. Investigations by State child protective service agencies in 48 States determined that 1.12 million children were victims of child abuse and negligence in 1994. This represents a 27 percent increase since 1990 when approximately 800,000 children were found to be victims of maltreatment.

Among the children, Mr. President, for whom maltreatment was substantiated or indicated in 1994, 53 percent suffered negligence, 26 percent physical abuse, 14 percent

sexual abuse, 5 percent emotional abuse, and 3 percent medical negligence.

Mr. President, this is a good amendment. Mr. President, this will protect women and children in our society. As I said, it will have a very positive effect on the ability to deport an alien involved with these offenses that we are adding through these two new headings.

I yield the floor.

Mr. DOLE. Mr. President, under Title 8 of the U.S. Code, a number of criminal offenses are deemed deportable offenses. However, although aliens are deportable for criminal offenses, there are a number of crimes that should be grounds for deportation that are left unaddressed; and the wording of the statute itself uses vague language like crimes of moral turpitude that lack the certainty we should desire.

The amendment offered by Senator Coverdell and myself seeks to remedy this problem by making clear that our society will not tolerate crimes against women and children. The criminal law should be a reflection of the best of our values, and it is important that we not only send a message that we will protect our citizens against these assaults, but that we back it up as well.

Under our amendment, certain criminal offenses would be grounds for deportation. These offenses include: conviction of a crime of **domestic violence**; violation of a judicial protection order in a **domestic violence** context; conviction for stalking; conviction for child abuse, child sexual abuse, child negligence, or child abandonment; conviction of rape, aggravated sodomy, aggravated sexual abuse, sexual abuse, abusive sexual contact, or other crimes of sexual violence.

CRIMES OF **DOMESTIC VIOLENCE**

Adding these additional and specified categories of offenses closes the existing loopholes. Many crimes, ranging from simple assault to murder can be committed in a **domestic violence** context. Simple assault or assault and battery are not necessarily going to be interpreted as crimes of moral turpitude. Yet, because they may not otherwise fall within the other definitions such as an aggravated felony of deportable offenses, an alien convicted of such a crime might not be deported.

Our amendment would cover all convictions for **domestic violence** offenses, including those for which a sentence of less than 1 year is available.

VIOLATION OF A PROTECTIVE ORDER

In many States, protective orders in **domestic violence** situations have been ineffective due to problems with enforceability and insufficient penalties for violations. This is undoubtedly one reason all 50 States have passed anti-stalking legislation.

Greater attention to the problem has influenced a number of States to make violation of a protective order a separate criminal offense. However, making violation of a protective order a grounds for deportation will put more teeth into such an order.

The amendment does not require a conviction of violating protection order and thus would cover violations even in States where violating an order is not a separate criminal offense. This is an important loophole that must be closed.

STALKING

It is long past time to stop the vicious act of stalking in our country. We cannot prevent in every case the often justified fear that too often haunts our citizens. But we can make sure that any alien that commits such an act we no longer remain within our borders.

It is estimated that over 200,000 women are stalked each year in the United States. Approximately 5 percent of all women will be stalked at some point in their lives. Stalking behavior often leads to violence which may result in the serious injury or death of stalking victims.

Stalkers often repeat their stalking behavior and escalate to violence. Of all the women killed in the United States by husbands or boyfriends, 90 percent were stalked before being murdered.

But since stalking laws are fairly new, they may not be defined as crimes of moral turpitude in many States – they thus may not be covered by existing law. Similarly, in many States, the maximum penalty for stalking is less than 1 year – which strikes me as far too little – and therefore an alien may be convicted of a stalking offense and yet not be deported.

We can't wait for stalkers to strike a second time. Let's deport them the first time.

Mr. President, we face the same kinds of problems with existing law when we confront other crimes against women and children. While some of these offenses may be deportable under the existing headings of crimes of moral turpitude or aggravated felony, they are not necessarily and always covered. They should be.

Uniformity is also a problem. Whether a crime is one of moral turpitude is a question of State law and thus varies from State to State. An offense may be deportable in one State and not deportable in another.

Mr. President, America already bears a horrendous burden when it comes to the level of violence among our citizens. It is not asking too much that we insist that we treat crimes against women and children as seriously as we do other offenses. Nor should we have to wait for that last violent act. When someone is an alien and has already shown a predisposition toward violence against women and children, we should get rid of them the first time. We owe that much to our citizens.

Mr. SIMON. Mr. President, I was just shown this amendment a few minutes ago by Senator Coverdell and Senator Dole. I have every reason to believe that we can work out, if not this specific language, some modification to do this. I commend my colleague from Georgia for the amendment.

I ask, and we have an understanding on this, I ask unanimous consent that it be set aside until tomorrow.

Mr. COVERDELL. Mr. President, I also acknowledge that the Senator from Illinois has only had a brief moment to scan the outline of the amendment. We understand that and have agreed to set it aside so there is a more appropriate period of time for his side to view the contents of the amendment.

The PRESIDING OFFICER. The amendment is laid aside.